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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MIKIO TANAKA,
MATSUO YASUDA, and TSUYOSHI AYAKI

Appeal 2015-004816
Application 11/665,026
Technology Center 1700

Before BEVERLY A. FRANKLIN, GEORGE C. BEST, and JEFFREY R. SNAY, *Administrative Patent Judges*.

BEST, Administrative Patent Judge.

DECISION ON APPEAL

The Examiner finally rejected claims 1, 3, and 7–10 of Application 11/665,026 under 35 U.S.C. § 103(a) as obvious. Final Act. (June 19, 2014). Appellants[1] seek reversal of this rejection pursuant to 35 U.S.C. § 134(a). We have jurisdiction. 35 U.S.C. § 6.

For the reasons set forth below, we AFFIRM.

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[1] Kureha Corporation is identified as the real party in interest. Appeal Br. 3.

BACKGROUND

The '026 Application describes a package of meat that includes an internal void. Spec. ¶ 1. Such packages are particularly useful in packaging whole carcass poultry from which the feathers and guts have been removed and semi-dressed or dressed fish from which the gills and guts have been removed. *Id.* ¶ 2.

Claim 1 is representative of the '026 Application's claims and is reproduced below from the Claims Appendix:

> 1. The package using deep drawing packaging for a lump of meat having a void within an inside thereof, comprising:
>
> a lump of meat having a void within an inside thereof; and
>
> a gas mixture of at least 2 kinds of gas, which has a volume (ml) corresponding to 30 ml or more and 150 ml or less per 1000g of the lump of meat,
>
> wherein the gas mixture of at least 2 kinds of gas has a carbon dioxide gas concentration of 8% or more and 90% or less and an oxygen concentration of 0.05% or more and 70% or less,
>
> further wherein the lump of meat having a void within an inside thereof and the gas mixture are packaged in a deep drawn package in a tightly sealed manner and in close contact with a packaging material,
>
> wherein said packaging material comprises a heat-shrinkable film, wherein the heat-shrinkable film has a shrinkage at 90° C of 15% or more.

Appeal Br. 23 (paragraphing added).

REJECTION

On appeal, the Examiner maintains the following rejection:

1. Claims 1, 3, and 7–10 are rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of GB '113,[2] Cerani,[3] and Nakamura.[4] Final Act. 3.

DISCUSSION

Appellants present separate arguments with respect to each of claims 1, 7, 9, and 10. *See* Appeal Br. 7–20. Claims 3 and 8 are grouped with independent claim 1. *See id.* at 7. Accordingly, we discuss Appellants' arguments with respect to each of the separately argued claims below.

Claims 1, 3, and 8. Appellants present specific arguments for reversal of the rejection of claim 1. *Id.* at 7–12. Claims 3 and 8 are alleged to be patentable by virtue of their dependence from claim 1. *Id.* at 12. We, therefore, limit our discussion to claim 1. Claims 3 and 8 will stand or fall with claim 1.

Appellants argue that the rejection of claim 1 should be reversed because (1) the plastic film described in the combination of GB '113, Cerani, and Nakamura "is fundamentally different from the heat-shrinkable film of Appellant's package," *id.* at 9, and (2) the Examiner has failed to identify an adequate reason for a person having ordinary skill in the art at the

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[2] GB 1 535 113, published December 6, 1978.

[3] US 6,488,972 B1, issued December 3, 2002.

[4] JP 2004-142752, published May 20, 2004. We cite the Patents Abstracts of Japan English-language translation, which is of record in the '026 Application.

time of the invention to have combined the descriptions in GB '113, Cerani, and Nakamura to arrive at the claimed invention, *id.* at 10–11.

We begin, as we must, by considering claim 1's language. With respect to the plastic film, claim 1 requires the use of a packaging material comprising "a heat-shrinkable film, wherein the heat-shrinkable film has a shrinkage at 90°C of 15% or more." This is the only limitation placed upon the plastic film in claim 1.

The Examiner relies upon Cerani as describing a heat-shrinkable film. Final Act. 4 (citing Cerani col. 13, ll. 27–31). In particular, Cerani describes its stretchable plastic film as optionally being heat-shrinkable. Cerani col. 13, ll. 27–31. If a heat-shrinkable film is used, Cerani describes the film as having a shrinkage at 90°C of at least 10%. *Id.* The Examiner further found that it would have been obvious to a person having ordinary skill in the art at the time of the invention to optimize the shrinkage property of the film to arrive at a film having a shrinkage at 90°C of 15% or more. Final Act. 5.

Appellants argue that the rejection of claim 1 should be reversed because

> [t]here are significant differences between the heat shrinkable film of the present package in method, and the stretch film of Cerani.
>
> Although the stretch film of Cerani also has heat treatable properties, the properties of Cerani's film differ from Appellant's heat shrinkable film both in the heat treatment properties and in the resulting effect on the package formed with the film.

Reply Br. 6.

This argument is not persuasive. We begin by noting that Appellants do not argue that the broadest reasonable interpretation of the term "heat-

shrinkable film," as used in the '026 Application's claims, does not encompass the plastic film described in Cerani. Instead, Appellants' attempt to persuade us, as a matter of fact, that the properties of Cerani's film and the heat-shrinkable film used in Appellants' packaging method are different. *See id.*; *see also* Appeal Br. 9 ("[T]he stretch film of Cerani is fundamentally different from the heat-shrinkable film of Appellant's package.").

This argument is not persuasive. Claim 1 only specifies a single property of the claimed heat-shrinkable film: a shrinkage at 90°C of 15% or more. As the Examiner found, Cerani describes the use of a heat-shrinkable film having a shrinkage at 90°C of at least 10%. Cerani col. 13, ll. 27–31. The Examiner further found that a person of ordinary skill in the art at the time of the invention would have arrived at a heat-shrinkable film having a shrinkage and 90° C of the leased 15% through routine experimentation. Final Act. 5. Appellants do not contest this finding.[5]

Appellants' remaining arguments concerning the differences between the prior art and the claimed invention are similarly unpersuasive. These arguments either are not tied to specific limitations set forth in the claims or consist of unsupported attorney assertion, which cannot take the place of actual evidence. *See* Appeal Br. 7–10.

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[5] We, therefore, need not rely upon the overlap between the range of shrinkage amounts described in Cerani and the range recited in claim 1. Such overlaps are sufficient to create a prima facie case of obviousness. *In re Harris*, 409 F.3d 1339, 1341 (Fed. Cir. 2005). We further note that Appellants have not argued that the difference between 10% free shrinkage at 90°C and 15% free shrinkage at 90°C is critical to the success of the claimed invention.

Appellants further argue that the Examiner has not provided any logical or common sense reason to combine the prior art in the manner relied upon in the rejection. *Id.* at 10–12. This argument is similarly unpersuasive.

The Examiner found that the combination of GB '113 and Cerani involves the use of known equivalents to perform the same function, *see* Final Act. 4–5, while the addition of Nakamura is motivated by a desire to prevent bacterial growth, *id.* at 6. Appellants have not persuaded us of the existence of reversible error in these findings.

In view of the foregoing, we affirm the rejection of claims 1, 3, and 8.

Claim 7. Appellants argue that the rejection of claim 7 should be reversed by virtue of its dependence from claim 1. Appeal Br. 12. Because we have affirmed the rejection of claim 1, we cannot reverse the rejection of claim 7 on this basis.

Appellants further argue that the Examiner erred by finding that the prior art describes or suggests a packaging material having an oxygen gas permeability at 23° C and 80% Rh of 200 mL/m^2 day atm or less. *Id.* at 12–13. This argument is not persuasive.

The Examiner found that the combination of GB '113, Cerani, and Nakamura is silent with respect to the packaging material's oxygen permeability. Final Act. 7. The Examiner further found that it would of been obvious to a person having ordinary skill in the art at two optimize the properties of the packaging material to arrive at the claimed oxygen gas

permeability.[6] *Id.* at 7–8. Appellants have not persuaded us that the Examiner's findings contain reversible error.

In view of the foregoing, we also affirm the rejection of claim 7.

Claim 9. Appellants' arguments for reversal of the rejection of claim 9 are substantially the same as those advanced for the reversal of the rejection of claim 1. *See* Appeal Br. 14–19. We, therefore, sustain this rejection for the reasons expressed in connection with the rejection of claim 1.

Claim 10. Appellants argue that the rejection of claim 10 should be reversed by virtue of the claim 10's dependence from claim 9. Because we have affirmed the rejection of claim 9, we cannot reverse the rejection of claim 10 on the basis of this argument.

Appellants further argue that the rejection of claim 10 should be reversed because the prior art does not describe or suggest the use of a gas mixture having an oxygen concentration of between 4% and 75%. *Id.* The Examiner found that a person having ordinary skill in the art would have arrived at the claimed oxygen concentration through routine optimization motivated by the desire to have sufficient carbon dioxide levels to inhibit the growth of aerobic bacteria while also allowing enough oxygen in the package to inhibit the growth of anaerobic bacteria. Final Act. 6 (citing GB '113 page 3, ll. 6–19). Appellants have not convinced us of reversible error in these findings nor have they provided evidence of the criticality of the

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[6] The Examiner observes that GB '113 and the '026 Application describe the use of the same packaging material. Answer 13. In the rejection, however, the Examiner proposes replacing GB '113's packaging material with that described in Cerani. Thus, this observation is not relevant to the question before us.

amount of oxygen contained in the package. Thus, we cannot reverse the rejection of claim 10 on the basis of this argument.

Appellants also argue that the Examiner has not provided an adequate reason for a person of ordinary skill in the art to modify the combination of references in the manner proposed in the rejection. Appeal Br. 19–20. As discussed above, this argument is not persuasive of reversible error.

In view of the foregoing, we affirm the rejection of claim 10.

CONCLUSION

For the reasons set forth above, we affirm the rejection of claims 1, 3, and 7–10 of the '026 Application.

No time period for taking any subsequent action it connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED